THE ATTORNEY GENERAL OF TEXAS

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June 16, 1973

The Honorable Governor Dolph Briscoe
Executive Department
State Capitol Building
Austin, Texas

Letter Advisory No. 53

Re: Senate Bill 807

Dear Governor Briscoe:

You have submitted to us a single question concerning Senate Bill 807, dealing generally with the qualifications of persons to serve as directors of Water Control Districts created under § 59 of Article 16 of the Constitution. Specifically it would amend various chapters of the Water Code by adding language disqualifying persons with potential conflicts of interest.

Among these disqualifications is one found in subsection(a)(5)(B) of the Bill which would render ineligible a person who is or has been within two years preceding his election:

> "a party to a contract with or along with a developer of property in the district relating to the district or to property within the district, other than a contract limited solely to the purpose of purchasing or conveying real property in the district for the purpose of either establishing a permanent residence or establishing a commercial business within the district."

You have asked us whether this provision is constitutional, particularly with reference to the distinction made between residents and non-residents, and if not, whether it is severable.

Reserving, for the moment, a discussion of the particular statute, § 14 of Article 16 of the Constitution of Texas provides:

> "All civil officers shall reside within the State; and all district or county officers within their districts or counties, and shall keep their offices at such places

> as may be required by law, and failure to comply with this condition shall vacate the office so held."

It is our opinion that under a strict reading of the Constitution neither a non-resident owner of commercial property nor a non-resident homeowner would be entitled to serve on the board of directors of such a district. Whitmarsh v. Buckley, 324 S. W. 2d 298)Tex. Civ. App., Houston, 1959, no writ hist.). However, in Kaufman County Levee Imp. Dist. v. National Life Insurance Co., 171 S. W. 2d 188 (Tex. Civ. App., Dallas, 1943, err. ref'd.), the court had before it the question of qualification of three directors of the district because they were non-residents.

Like the water districts involved in Senate Bill 807 the levee improvement district was organized under § 59 of Article 16 of the Constitution. The court there posed to itself the question of the application of § 14 of Article 16 "to improvement districts . . . created under recent amendments to the Constitution." It held that it did not apply. Its reasoning was:

> " . . . A fundamental rule is that constitutions should receive a consistent and uniform interpretation, so that they shall not be taken to mean one thing at one time and another thing at another time. 6 R. C. L., p. 46, Section 39. Constitutions do not change with the varying tides of human affairs, but the will of the people as expressed therein remains inflexible until repealed or changed by amendment. 11 Am. Jr. p. 659, Section 50.
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> "Improvement districts, such as the District involved here, were unknown in 1845 when Section 14 of Art. 16 became a part of the constitutional law of the state; nor did such districts come into existence until after the constitutional amendment known as Section 52 of Art. 3 was adopted in November, 1904, and more extensively after the amendment known as Section 59 of Art. 16 was adopted in August, 1917, hence we do not think Section 14 of Art. 16 has any application whatever to the District involved here.

> "Although we have no precedent from the courts, yet in quite a number of Acts, creating improvement districts under Section 59 of Art. 16, the Legislature proceeded in utter disregard of Section 14 of Art. 16, in prescribing the place of residence of members of the governing bodies of such districts; in other words, the Legislature has consistently acted as though Section 14 of Art. 16 had no application to the subject." (171 S. W. 2d at 189).

The court then cited a number of districts created under the constitutional provision in which there is no requirement in the statute that the directors be residents of the district. It concluded:

> " . . . Thus it seems that the Legislature, in prescribing the residences of members of the governing bodies of these improvement districts, acted without reference to the provisions of Section 14 of Art. 16. While not binding upon the courts, the consistent unchallenged legislative and departmental construction of the Constitution, extending over a period of years, should be followed by the courts, unless manifestly wrong. American Indemnity Co. v. City of Austin, 112 Tex. 239, 248, 246 S. W. 1019, Mumme v. Marrs, 120 Tex. 383, 40 S. W. 2d 31, and authorities cited; Cox v. Robison, 105 Tex. 426, 439, 150 S. W. 1149." (171 S. W. 2d at 190)

See also Walton v. Brownsville Navigation Dist., 181 S. W. 2d 967 (Tex. Civ. App., San Antonio, 1944, writ ref'd.).

Based on this authority, we conclude therefore that it is not necessary that any director be a resident.

Section 3 of Article 1 of the Constitution of the State of Texas and the Fourteenth Amendment to the Constitution of the United States guarantee to the citizens of the States, equal protection under the laws of the States.

Equal protection requires that a legislative classification should be reasonable for the purpose of the legislation, and must not be arbitrary. Bjorgo v. Bjorgo, 492 S.W. 2d 143 (Tex. 1966); Buchanan v. State, 480 S.W. 2d 207 (Tex. Crim. 1972); McDonald v. Board of Election Commissioners of Chicago, 394 U.S. 802, 89 S. Ct. 1404, 22 L. Ed. 2d 739 (1969); Reed v. Reed, 404 U.S. 71, 92 S. Ct. 251, 30 L. Ed. 2d 225 (1971).

Application of these rules in a particular case is not always easy. Chief Justice Warren, in McGowan v. Maryland, 366 U.S. 420, 425-426, 81 S. Ct. 1101, 6 L. Ed. 2d 393 (1961), said:

> "Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

The section in question would disqualify from holding the public office of director of a water control board of directors, persons who, within a period of two years, had been a party to a contract to which "a" developer of property in the district had also been a party, which contract either relates to the district or to property within the district. The only exceptions are those whose contracts were "limited solely" to the purpose of buying or selling real property in the district for use either as a permanent residence or as a commercial business.

Assuming the purpose of the proposed statute to be to eliminate conflicts of interest between developers, on the one hand, and boards of directors of water districts on the other, we can see no reasonable relationship between the classification of subsection (a)(5)(B) and that purpose.

The man who is a long time resident of the district, engaged in business there, and most interested in its welfare, would be ineligible because 18 months earlier he had sold goods or services to a developer. The resident who sold a large portion of his homestated to the developer would be ruled out while his neighbor who sold a lot for the purpose of establishing a "permanent residence" would not.

The short time allowed us to examine this Bill and determine its constitutionality has not permitted us to make that type of examination into its purposes and effects that we might otherwise have made. However, based upon our review of subsection (a)(5)(B) of Senate Bill 807 it is our opinion that, even though a presumption prevails that the provision is constitutional, nevertheless it is probable that a reviewing court would hold it to be unreasonable and arbitrary and, thus, unconstitutional.

We have limited our review of Senate Bill 807 to the specific section you referred to us, and should not be understood as passing upon the constitutionality of any other of its provisions.

Senate Bill 807 contains no provision either for severability or non-severability. Article 5429B-2, Vernon's Texas Civil Statutes, the Code Construction Act, in § 3.12 provides, in part:

> "In the absence of such determination by the Legislature in a particular Act for severability or non-severability, the following construction of such Act shall prevail: If any provision of a statute or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the statute which can be given effect without the invalid provision or application and to this end the provisions of the statute are severable."

Should the courts determine a partial unconstitutionality, it is our opinion that other provisions of subsection (a) of Senate Bill 807 can be given effect, if necessary, without the provisions of (5)(B). Even if

that provision were to be declared unconstitutional, which in our opinion it probably will be, it is our opinion nevertheless that remaining portions would provide a valid and workable statute if signed into law.

Very truly yours,

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APPROVED:

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Opinion Committee